

Wednesday, 12 June, 1946

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

ON

The Application submitted on
Behalf of the Accused HIROTA, Koki,
for leave to File Designated Motions:

1. Demurrer to certain counts
and parts of the Indictment.
2. Motion for a separate trial.
3. Motion suggesting the dis-
qualification of the
Philippine Justice appointed
to the Tribunal.
4. This application.

Before:

HON. SIR WILLIAM WEBB, President
of the Tribunal and Member
from the Commonwealth of
Australia.

Reported by:
Julian Wolf,
Court Reporter,
IMTFE.

A P P E A R A N C E S

For the Prosecution Section:

MR. A. S. COMYNS CARR, Associate Counsel,
acting on behalf of the United Kingdom
of Great Britain and Northern Ireland;

MR. CARLYLE HIGGINS, Assistant to the
Chief of Counsel, acting on behalf of
the United States of America;

MR. FRANK S. TAVENNER, JR.; and

MR. EUGENE D. WILLIAMS

For the Defense Section:

MR. DAVID F. SMITH, Counsel for Accused
HIROTA, Koki;

MR. WILLIAM J. MCCORMACK, Counsel for
Accused OSHIMA, Hiroshi; and

MR. OWEN CUNNINGHAM, Counsel for
Accused MINAMI, Jiro.

For the Office of the General Secretary, IMTFC:

VERN WALBRIDGE, Colonel, CAC,
General Secretary;

G. W. HANLEY, Lieutenant Colonel, AC,
Executive Officer;

EDWARD H. DELL, Judge,
Legal Adviser to the Secretariat;

MR. G. WALTER BOWMAN,
Clerk of the Court;

MR. CHARLES A. MANTZ,
Deputy Clerk of the Court; and

DAVID P. HORNSTEIN, Ensign, USNR,
Language Section Chief.

The proceedings were begun at 0930.

THE PRESIDENT: This is an application filed by HIROTA, Koki, for leave to file designated motions, namely: (1) Demurrer to certain counts and parts of the Indictment; (2) Motion for a separate trial; (3) Motion suggesting the disqualification of the Philippine Justice; and (4) This application.

What are the appearances?

MR. SMITH: Your Honor, I am the American counsel for Mr. HIROTA.

We seek first to file a demurrer, and if your Honor has read the appended demurrer which we seek to file, I will not stop to discuss it. I would like to say that I would like to have the record treated as though I read the proposed demurrer into the record verbatim. Does your Honor desire that I take these up separately and wait for a ruling?

THE PRESIDENT: I think you better read each of your suggested motions, yes.

MR. SMITH: Does your Honor mean verbatim?

THE PRESIDENT: Yes, I would have to read them in silence, otherwise. You better read them for me.

MR. SMITH: I will pass over the caption:

"DEMURRER TO CERTAIN COUNTS OF THE INDICTMENT
FILED WITH THE TRIBUNAL 3 MAY, 1946.

"Now comes the defendant, HIROTA, Koki, by his attorneys of record, and files a demurrer to the herein-after described counts and parts of the Indictment heretofore filed with the Tribunal on 3 May, 1946, and says such counts and parts of the Indictment are bad, both in substance and form.

"The portions of the Indictment reached by the demurrer are:

"Counts 1 to 17, inclusive, and the alleged preamble to such counts; counts 19 to 25, inclusive; counts 27 to 38, inclusive; counts 37 to 47, inclusive, and the alleged preamble to such counts; and count 52.

"The points to be argued are:

"1. The foregoing counts and parts of the alleged Indictment do not charge the commission by this defendant of any offense known to any body of law in the world."

THE PRESIDENT: Will you explain what that means? You do not gather that from the face of the Indictment, do you, that the accused HIROTA is just named among others and there is no particular description of him given or of his offices, which he filled from time to time?

MR. SMITH: Well, if your Honor will refer to one of the appendices to the Indictment, there is quite a lengthy paragraph showing what office HIROTA occupied

in the government that are tied in by reference to the Indictment.

THE PRESIDENT: Yes, but does that cover the whole of the period alleged in the particular counts?

MR. SMITH: It does, your Honor. Mr. HIROTA was ambassador to Russia in 1930, so that it carries almost back to the inception of the Indictment, that is, almost to 1928.

THE PRESIDENT: But it would be possible, would it not, for an ambassador, a Japanese ambassador in Russia, to conspire with the military? What would there be to prevent him from so doing? Does the mere status of ambassador put him above conspiracy in any way? He is alleged to have conspired. What the evidence will be concerning the conspiracy, we do not know, yet; we have not heard it. Unless I assume, for the purpose of this certain application, that once a man becomes an ambassador and goes to Moscow, it is completely beyond his power, evidently, for him to enter into a conspiracy with anybody in Japan about anything.

MR. SMITH: Very well. Our answer to that, your Honor, is, and we say it most respectfully, that he never conspired with anybody. In the second place, if he did, he was acting in the government of Japan itself, and not as an individual.

THE PRESIDENT: But what I want to point out to you is the difference between what the Indictment alleges and what evidence there is to prove the allegation. They are two distinct things.

MR. SMITH: Can I go back to paragraph 1, which I have just finished reading? It states that the Indictment does not charge the commission by this defendant of any offense known to any body of law in the world. I assume that under the Charter, if your Honor takes knowledge of obvious facts, you certainly take knowledge of the existence or non-existence of the state of the law; that certainly is a matter that can be raised by demurrer, it seems to me.

THE PRESIDENT: Yes, but I do not propose to grant this application to that particular claim. It does not disclose any offense against international law. I will allow you to bring a separate motion as to these matters.

MR. SMITH: Your Honor, can I be clarified? I assume that when I came here this morning I had a simple application to file these motions. I did not contemplate I was going to be called on to argue this morning, or that one judge of the Court was going to decide.

THE PRESIDENT: I am not going to decide whether you get leave. My colleagues have delegated that you

should get leave with your application.

MR. SMITH: Can I continue?

THE PRESIDENT: You may say that I refuse to grant this application to you and that I am only one judge out of eleven, and, if you take that stand, I certainly will not insist in hearing an application that you want to make to me. You about paralyzed me once.

MR. SMITH: Your Honor understands that I have the highest regard for the Court and I have no desire to make any contentions.

THE PRESIDENT: You may say that you do not feel inclined to leave to one judge the responsibility of deciding on any application, but then what would the position be if I brought the other ten judges here? I would have to adjourn the matter to a later date. They sent me here to hear what you have to say with the view of determining, according to my own judgment, something that should be the subject of a separate motion. After all, none of these points will be discussed out in the course of the general hearing of the case. We have a choice of deciding points separately, such as you suggest. We should do it here on our own. If it be decided, in the general course of the hearing, it does not follow, because I say "no" to your application, that it will be the last word that may be said about any of these points.

MR. SMITH: I always understood, your Honor, after twenty years in courts, that demurrer is a preliminary matter that should be presented at the earliest stage. As a matter of fact, I think it cannot be properly presented after the testimony.

THE PRESIDENT: I will not say that the procedure is wholly inept. An indictment in criminal proceedings is different than when the indictment is being presented and objections are presented to it, and it is not called a demurrer. They are applications to strike out, or to quash some such thing, but I am not standing on technicalities today.

MR. SMITH: Our trouble is, your Honor, that you have not prescribed any rules or regulations than an Anglo-Saxon lawyer can follow. We do not know whether you can use a motion to dismiss, or demurrer, or a motion to strike, and the only thing we can do is to follow the practice as we know it in the United States.

THE PRESIDENT: Yes, I realize that, and as far as possible, I would like to be guided by United States practice.

MR. SMITH: You can certainly clarify matters if the Court could make that announcement.

THE PRESIDENT: If you want a judge, who is

familiar with the United States practice, you have not got him here this morning.

MR. SMITH: I assume, your Honor, that Australian judges are very familiar with the United States practice and decisions. As I told you the other morning I tried a great many Australian cases.

THE PRESIDENT: We have a certain familiarity with the United States decisions, certainly. I would not say that, except in a very general way; but I do assume, that, in the United States, there would be no such thing as demurrer in a criminal proceeding. Am I wrong?

MR. SMITH: I think your Honor is entirely wrong about that. I think I filed four hundred demurrers in the last twenty years. I think in the new criminal rules, promulgated by the supreme court, which I intended to still further amplify, your criminal procedure used a motion to dismiss, but it is merely a change of label; I mean the substance is the same.

THE PRESIDENT: We operate under a code which prescribes the forms and does not embrace any such sustained forms as demurrers. However, I am not quarreling with the fact that you are trying to determine as to these matters in the Indictment. You are really asking, in effect, that they be struck out, as disclosing

no offense known to the law. I am not inclined to give you leave to bring up that matter on a separate motion. I do intimate, at the same time, that I see no reason why any of these points, if worth while, should not be debated in the normal course of the trial.

MR. SMITH: Your Honor, when this colloquay got started, I did mention just one of six paragraphs in this demurrer, and without expending any more time, could the reporter simply copy this demurrer into the record?

THE PRESIDENT: Yes. Very well, Mr. Smith.

(Addressing reporter): You do that.

(Said document reads as follows):

"DEMURRER TO CERTAIN COUNTS OF THE INDICTMENT

FILED WITH THE TRIBUNAL 3 May 1946.

"Now comes the defendant, HIROTA, Koki, by his attorneys of record, and files a demurrer to the hereinafter described counts and parts of the Indictment heretofore filed with the Tribunal on 3 May 1946, and says such counts and parts of the Indictment are bad, both in substance and form.

"The portions of the Indictment reached by the demurrer are:

"Counts 1 to 17, inclusive, and the alleged preamble to such counts; counts 19 to 25, inclusive; counts 27 to 38, inclusive; counts 37 to 47, inclusive, and the alleged preamble to such counts; and count 52.

"The points to be argued are:

"1. The foregoing counts and parts of the alleged Indictment do not charge the commission by this defendant of any offense known to any body of law in the world.

"2. The defendant occupied the high office in the Japanese Government of Ambassador to Russia, Foreign Minister, and Prime Minister. He is indicted for alleged acts and possibly acts of omission while serving in his official capacity as aforesaid in the Japanese Government, and not otherwise. The actions

taken by the defendant while occupying the aforesaid offices in the Japanese Government are beyond the reach of any body or system of law known to the world, and are immune to re-examination by any sovereign nation or group of nations anywhere in the world.

"3. The alleged acts and possibly acts of omission charged against the defendant in the foregoing counts and parts of the alleged Indictment were acts of the Japanese Government acting in its sovereign capacity as a government, and this defendant is not subject to prosecution as an individual or by reason of having been an actor in the performance of his governmental functions.

"4. Neither of the foregoing counts or parts of the alleged Indictment inform this defendant of the nature and the cause of the accusation against him.

"5. The foregoing counts and parts of the alleged Indictment consists in their entirety of conclusions and argumentative matter.

"6. And for other matters appearing on the face of the foregoing counts and parts of the alleged Indictment to be argued.

HIROTA, Koki
by

/s/ Tadashi Hanai
Tadashi Hanai
Japanese Counsel

/s/ David F. Smith
David F. Smith
American Counsel

To:

The International Military Tribunal for the Far East

And to:

The General Secretary Thereof."

MR. SMITH: The second motion, your Honor, is the motion for a separate trial, and is based primarily on the fact that Mr. HIROTA has always been on the civil side of the Japanese government, and never occupied any military and naval office requiring him to be tried in a mass Indictment with a large number of defendants -- naval and military -- which will predjudice his case.

Another thing that I point out, in the application for a separate trial, is that this Indictment covers seventeen years of Japanese history and governmental action, and is going to involve thousands of issues, and he is going to be so entangled with these multitudes of facts and separate and inconsistent defenses, that he makes the point that his defense is going to be lost in the confusion.

THE PRESIDENT: Ordinary conspirators, or alleged conspirators are tried together, not separately. I could visualize a case in which there might be separate trials, perhaps, but I have never known of such a trial.

MR. SMITH: I recall one case in the District of Columbia in which the indictment was against three alleged conspirators. One died before the trial, the other was incapacitated, but they put the third one

on trial, and he was convicted and the Court of Appeals sustained the conviction. There was a single defendant on trial in a conspiracy case. In legal theory, there is no objection to it, so far as I can see.

THE PRESIDENT: I would not say that, but ordinarily alleged conspirators are tried on each charge of conspiracy with the others named in the indictment, and who are the accused. If they were charged with conspiracy with somebody not before the court, it might be different.

MR. SMITH: May the record show, verbatim, what the appended motion contains.

THE PRESIDENT: Yes.

(Addressing reporter): You do that.

(Said document reads as follows):

"MOTION OF HIROTA, Koki,
FOR A SEPARATE TRIAL

"Now comes the defendant, Hirota, Koki, by his duly appointed attorneys of record, and moves the Honorable, the International Military Tribunal for the Far East, for an order granting this defendant a separate trial on the Indictment heretofore filed with the Tribunal on 3 May, 1946, and as grounds for said motion says as follows:

"1. The defendant is indicted for acts and possibly acts of omission in his capacity as Japanese Ambassador to Russia and as Foreign Minister and Prime Minister of Japan. He never occupied any military or naval office in the Japanese Government. The joining of this defendant with a large number of military and naval officers of the Japanese Government renders it impossible, from both a legal and practical standpoint, for this defendant to obtain a fair and impartial trial, and his trial jointly with a large number of such military and naval officers will hopelessly prejudice his defense.

"2. The Indictment covers a period of seventeen years of Japanese history and governmental action. The trial of this defendant jointly with

twenty-seven other defendants involves many thousands of issues which cannot be reasonably or conveniently presented in a single trial or proceeding. The trial involves such a multitude of defendants and facts and will require such an inordinate period of time for its consideration and determination that this defendant has no possibility of a just determination of the merits of his case in the context of a joint trial.

"3. The Indictment and the defense to the Indictment will involve a presentation of facts of such enormous proportions that a joint trial will prove to be unwieldy and of indefinite duration.

"4. And for other matters to be argued.

HIROTA, Koki
by

/s/ Tadashi Hanai
Tadashi Hanai
Japanese Counsel

/s/ David F. Smith
David F. Smith
American Counsel

To:

The International Military Tribunal for the Far East;

And to:

The General Secretary Thereof."

MR. SMITH: The third motion suggests the disqualification, and personal bias of the Philippine Justice of the Tribunal.

(The President directed the reporter to copy said motion into the record.)

(Said document reads as follows):

"MOTION SUGGESTING THE DISQUALIFICATION
AND PERSONAL BIAS OF THE PHILIPPINE
JUSTICE OF THE TRIBUNAL.

"Now comes HIROTA, Koki, by his duly appointed attorneys of record, and moves the Honorable, The International Military Tribunal for the Far East, for an order adjudging that the Honorable Delfin Jaranilla, the Philippine Justice representing the Commonwealth of the Philippines on this Honorable Tribunal, is disqualified to sit and function as a Justice of this Honorable Tribunal, and as grounds for said motion says as follows:

"1. The defendant and his counsel of record are informed and believe, and upon such information and belief allege that the Honorable Delfin Jaranilla, the Philippine Justice upon the Tribunal, was captured by the Japanese armed forces in the Philippines during the early part of World War No. 2 and was forced by the Japanese army, while he was in an impaired state of health, to undergo an inordinately long march popularly called during World War No. 2 "The Death March of Bataan," and for a long time after his said capture was held as a prisoner of war. As the so-called "Death March of Bataan" is part of the evidence which will come before this Tribunal under the pending

Indictment, and as the Honorable Delfin Jaranilla, the Philippine Justice, was a participant and actor in such episode, he has and maintains in the legal sense a personal bias and prejudice against this defendant. By reason of the foregoing the defendant is unable to obtain a fair and impartial trial before this Honorable Tribunal with said Philippine Justice sitting as a member of the Tribunal.

"2. Counsel certify that the grounds stated in this motion are made in good faith and not for any purpose of hindrance or delay.

HIROTA, Koki,
By

/s/ Jadashi Hanai
Japanese Counsel

/s/ David F. Smith
American Counsel

To:

The International Military Tribunal for
the Far East;

And to:

The General Secretary Thereof."

MR. SMITH: I would like to profess what I have to say; that it is personally very embarrassing to me to present this matter. The Philippine Justice is a graduate of Georgetown University Law School, of which I have the honor to be a graduate. I met him at a reunion at Sofia University last Sunday afternoon, and facts contained in this motion came to me quite inadvertently.

THE PRESIDENT: I think, Mr. Smith, that I am governed by the decisions of my colleagues on this very point. They have no power to set aside an appointment by General MacArthur as head of SCAP, and I do not think I could induce them to do that, if I gave it to them.

They decided that way in my own case, which I was hoping would be decided on vastly different grounds. I do not wish to rest on that, I can assure you. I would have preferred the facts to have been gone into. In my case, however, they took the view that they could not question General MacArthur on that point.

MR. SMITH: May I say, your Honor, that we take the view that every court and tribunal, anywhere in the world, is always called upon to determine the qualifications and competency of its own members.

THE PRESIDENT: Yes, I do not know whether a court is really in a position to try the competencies of the members of that particular court. I mean, ordinarily,

it is left to the individual judge to satisfy himself.

MR. SMITH: Well, our position is that, if the facts were true, world opinion would not justify the Philippine Judge in sitting as a Member of this Tribunal. He has facts, of his own personal knowledge, which may creep into the case. We have no opportunity to cross-examine what he carries with him, as a matter of his own personal knowledge, and it all goes to the point as to whether these defendants are getting a fair and impartial trial, as we have known it up to this point.

THE PRESIDENT: Yes. Well, I do not think, if I gave you leave, that the Tribunal will be likely to review its decision in my case, and also your own case, because, they do not offer very clear grounds for challenge. I do not think so.

MR. SMITH: May I point out, your Honor, without taking too much time this morning, that in the United States we have in the Federal practice, a form of affidavit of personal bias, which files statements of facts. It appears to be sufficient on its face and goes to the judge who is about to preside in the trial, and he is required, under the law, to automatically disqualify himself. Even if he knows the affidavit to be untrue, he cannot controvert it. He must automatically retire and allow some other judge to preside. Now the attorney who

filed it, if he filed it in bad faith, might find himself going to jail for having made the allegation, but the judge himself is out of the picture.

THE PRESIDENT: Up to a point, that can be done without any practicable inconvenience, but it often occurs that if the judge is objected to, and disqualifies himself, there will not be any case, because there is no other judge available. That has happened. Here, the position is somewhat the same, I think. I could have said: "Well, I am objected to; I will get out and go back to Australia," but I decided, before I came here, I was qualified. I investigated, independently too, and I did not feel in any case that I should have to withdraw. On that principle a judge who is objected to may retire, but I shall leave it to my colleagues. I think that is the position now as regards this. We are all here and if a judge retires voluntarily, merely because of the objections, it will be very difficult to replace him. It is going to create a long delay and it is wholly unfair to the other judges that he should get out unless there is every reason for thinking his qualifications are not beyond challenge.

MR. SMITH: I had hoped, your Honor, that you would appoint alternate judges to this Court. It is going to be such a tremendous trial that if one or more of the judges should be taken ill, or die during the

trial, it is going to raise some serious questions as to whether or not a new man could be brought in and take up in the middle of the case.

THE PRESIDENT: Well, the Charter provides for that, but I will not make any pronouncements on the validity of that.

Mr. Carr, did you wish to say anything?

MR. COMYNS CARR: On this point?

THE PRESIDENT: Yes. In opposition to the application.

MR. COMYNS CARR: This application?

THE PRESIDENT: No. To any of them.

MR. COMYNS CARR: I agree with your attitude.

THE PRESIDENT: If you would like to have your views on the record, I will be only too glad to take them.

MR. COMYNS CARR: I do not think it is necessary, unless you were disposed to grant any of them, for the prosecution to say anything.

THE PRESIDENT: You do not wish to say anything at all.

MR. CUNNINGHAM: I am attorney for OSHIMA, and I would like to join in Mr. Smith's motion, if it is to be filed, on the separate trial, because my man is also an ambassador and I feel that his trial should

be separate from the military. Now, on that proposition, I am in accord with Mr. Smith. I do not think it is fair that they should be tried with the military and naval men, because the extent of the trial on the other score is so intensive and the extent of the trial of these men is so limited, that I should like to join, if the Court wants more support for that motion. The second thing that I have in mind is that I should like to submit a motion to the Court to bring my record up to date.

THE PRESIDENT: But you have to follow with certain---

MR. CUNNINGHAM: That is right, but I did not wish to file it, if it is to be submitted to one Member of the Court for determination, because I had resolved that it would be a waste of my time and a waste of the Court's time.

THE PRESIDENT: I really should not hear you, because you are not a party to the motion and you have not observed the rules in that regard.

MR. SMITH: In order--

THE PRESIDENT: Anyhow, I have no objection to have a record made of what you have just said.

MR. SMITH: Your Honor, in order to put the

finishing touch on your Honor's action, I should like to have an exception to the refusal of the Court to allow these motions to be filed.

THE PRESIDENT: Yes, on this.

MR. SMITH: That is the practice we have used in the United States, to save a point.

THE PRESIDENT: Yes, in case you want to appeal it.

MR. SMITH: Yes, sir. We think we can get into the courts of the District of Columbia, and we think that General MacArthur has the inherent power to set aside this trial, as well as any sentence, and whether it is good or bad, we may have to make the application. That is why we want to save these points.

THE PRESIDENT: Then you may take whatever course is necessary to save the point and I will take the record of it.

The application is dismissed.

(Whereupon, at 0958, the proceedings ended)